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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1394

HAROLD W. FOLLETTE, Warden of Green Haven Prison, Stormville, New York,

Petitioner,

against

FELIX COMACHO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6170

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STATUTE CITED

28 U.S.C. § 1254(1) 2

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No. .....

HAROLD W. FOLLETTE, Warden of Green Haven Prison, Stormville, New York,

Petitioner,

against

FELIX COMACHO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, the Warden of Green Haven State Prison, Stormville, New York, in which respondent is presently incarcerated, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the case of *United States of America ex rel. Felix Comacho* v. *Follette* (judgment entered on February 2, 1970). On petitioner's motion, the mandate was stayed by the Court of Appeals on March 3, 1970. Fed. R. App. Proc. 41(b).

Citations to the Opinion Below

The District Court opinion is unreported. It is reproduced as Appendix "A" to this petition. The opinion of the Court of Appeals for the Second Circuit is as yet unreported. It is reproduced as Appendix "B" to this petition.

Jurisdiction

The judgment of the Court of Appeals was entered on February 2, 1970.

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Questions Presented

Is respondent entitled to a hearing with respect to his allegation that his guilty plea, entered during trial, was induced by the existence of an allegedly coerced confession, as well as the need to utilize the pre-*Jackson* v. *Denno* procedure for testing it?

Statement of the Case

Respondent and two co-defendants, Villanueba and Ramos, were charged with murder in the first degree in connection with a mugging which took place on the evening of August 3, 1962. Both co-defendants pleaded guilty to the crime of murder in the second degree. At respondent's trial, the District Attorney stated in his opening remarks to the jury that, in addition to the girl who responded to the victim's cries, who would describe the three men she saw running from the scene of the crime, he would call as a witness the co-defendant Ramos, who would testify that respondent had the knife and did the actual stabbing. He also intended to introduce respondent's admissions to the police.

According to defense counsel's opening to the jury, he expected to show that appellant was a hard-working man who had been paid on the day of the crime; that he went with the other two men and while he stood at some distance from the scene of the crime he heard a man cry out, whereupon he ran for a cab; that after his arrest he was

taken to the hospital where the victim said he was not one of the attackers; and that his admissions to the police were coereed and took place during a delay in his arraignment.

The District Attorney called as a witness a girl who testified *inter alia*, that the tallest of the three men she saw run from the scene of the crime was wearing a short-sleeve green shirt. A police officer testified that he arrested respondent near the scene of the crime and that respondent was "sweating profusely and breathing heavily". Another officer connected with the arrest testified that respondent was wearing a short-sleeve green sport shirt at the time. Respondent was taken to the hospital for identification by the victim but, according to the arresting officer, no identification was made because the victim was physically unable to respond. The arresting officer denied that he had struck or threatened respondent. Nor had he seen any other police officer do so. Respondent was not refused food or denied permission to sleep. Respondent gave a statement intended to be exculpatory to the District Attorney on the morning following the crime and was arraigned the next morning with his two co-defendants.*

A *voir dire* to test the voluntariness of the statement was held before the jury. On the *voir dire*, respondent testified that he was struck by the policeman questioning him and that the police turned away his brother when he came to the precinct to make inquiries. On cross-examination he denied having anything to do with an earlier assault that evening and admitted having a prior conviction. He admitted that he was with his co-defendants at the time the crime was committed, but disclaimed any involvement in it or knowledge of what was happening. The

* Villanueba had been arrested with him. Ramos was not arrested until the night before the arraignment.

defense then introduced into evidence Department of Correction records showing that on arriving at the jail after arraignment he had complained of a headache and had been given two aspirins.

At this stage of the trial, respondent offered to withdraw the plea of not guilty and plead guilty to the crime of murder in the second degree to cover the homicide indictment and another indictment charging him with robbery. The minutes of plea show that the Court questioned respondent at length before accepting the plea. Respondent confessed to his guilty participation in the crime. He specifically acknowledged that he knew his co-defendants intended to commit a robbery when he joined them and in describing the homicide, stated "I was up the street, watching so no one would come". When the victim started to yell he panicked and ran.

When he appeared for sentence he stated to the Court, "I want to say to the Court, if I don't get a light sentence in this case that I would like to withdraw my plea and go on with the case." His attorney stated, "there is no legal cause why sentence should not be pronounced." Respondent was then sentenced to a term of 30 years to life in state prison.

In his application to the District Court respondent alleged that the introduction of the allegedly involuntary confession at trial induced his guilty plea,* a claim he had failed to raise in the state courts until three years after his conviction, despite at least one prior application for state relief. The opinion of the District Court predated the decision of the Second Circuit in *United States*

* Other claims related to the delay in arraignment and allegations that he was not advised of his constitutional rights, that he was incompetently represented, that a judicial promise regarding sentence was conveyed to him by counsel, and that his plea was subject to an improper condition. Certain of these claims were abandoned on his appeal to the Circuit Court and, as to the others, it was conceded that he had not exhausted his state court remedies.

ex rel. Ross v. *McMann* and its companion case, *United States ex rel. Dash* v. *Follette*, 409 F. 2d 1016 (2d Cir.), cert. granted 38 U.S.L.W. 3127 (No. 153) (October 13, 1969), dismissed as moot as to Ross, 38 U.S.L.W. 3209 (December 8, 1969). The District Court held that if the plea was voluntary any prior defects were waived according to the rule stated in *United States ex rel. Glenn* v. *McMann*, 349 F. 2d 1018 (2d Cir. 1965), cert. denied 383 U. S. 915 (1966). The Court went on to find that the plea was voluntary, in the process, rejecting the allegation of inadequate representation by counsel, and finding, upon review of the minutes of plea, that respondent "was thoroughly questioned by the Court" and understandingly and voluntarily entered the plea. The Court reasoned:

> "The plea was entered after witnesses had testified that a man dressed as petitioner was at his arrest had fled from the scene of the crime. Police officers had testified that they had not beaten petitioner in order to obtain his confession. The prosecutor, in his opening remarks to the jury, had indicated that one of the co-defendants would testify in support of the state's case. In these circumstances counsel's advice may well have been in petitioner's best interest. In any event it cannot be said to have been improper." [3a]

The Second Circuit reversed the order of the District Court and remanded for a hearing holding that the case was governed by its rule in *Ross* and *Dash*. The Court noted that "Comacho's petition alleges an almost identical causal connection between his claimed involuntary confession and subsequent involuntary guilty plea", i.e., the inadequate procedure available in New York for testing the voluntariness of a confession prior to this Court's decision in *Jackson* v. *Denno*, 378 U. S. 368 (1964). The only difference the Court found between this case and *Ross* and *Dash* was the fact that respondent's plea was entered during trial after he had attempted to suppress

the confession. In remanding for a hearing the Court stated:

> "In the present case, as in *Ross* and *Dash*, it cannot be ascertained from the record alone whether the ultimate decision to plead guilty was due to the weight of the evidence against the accused or was induced by fear of the prejudicial consequences of the jury's exposure to the evidence on the voluntary or involuntary nature of the confession." [14a]

Reasons for Granting the Writ

1. The decision by the Court below was based on a decision which is presently *sub judice* here.

This case was remanded for a hearing in the District Court pursuant to an undifferentiated application of the rule stated by the Second Circuit in *United States ex rel. Ross* v. *McMann* and its companion case, *United States ex rel. Dash* v. *Follette*, 409 F. 2d 1016 (2d Cir.), *cert. granted* 38 U.S.L.W. 3127 (No. 153) (October 13, 1969), dismissed as moot as to Ross, 38 U.S.L.W. 3209 (December 8, 1969). Although the Circuit Court noted that respondent had gone to trial and attempted to suppress his statement, while the guilty pleas in the other cases were entered prior to trial, it concluded that in both situations there was an issue as to whether the pre-*Jackson* v. *Denno* procedure motivated the plea.

We believe that certiorari should be granted in the instant case since a reversal or a reinterpretation of *Dash* and its companion cases by this Court would render anomalous a District Court hearing based on the Circuit Court's view of this problem which we regard as erroneous. Furthermore, we believe that certiorari should be granted for the reasons stated in the brief on the merits submitted by the State of New York in the above cases pending in this Court.

2. Since respondent pleaded guilty during trial his decision to plead was not influenced by the existence of the pre-*Jackson* v. *Denno* procedure.

A second reason for granting certiorari is the fact that the claim herein is frivolous because respondent, although aware of the pre-*Jackson* v. *Denno* procedure, went to trial. By doing so he demonstrated not only that that procedure was no deterrent to such action but also that it was often advantageous to the defendant. Thus, respondent was able to know what evidence was available to the prosecution and, at the same time, to test how his coerced confession claim would hold up before deciding to plead. He and his attorneys were then in the best possible position to evaluate whether it was in his interests to continue with the trial. Respondent had two experienced attorneys at his trial. Although one of these attorneys has since deceased, no affidavit by the surviving attorney was presented in connection with petitioner's application and no explanation for this absence was made. Obviously, respondent's experienced attorneys justifiably concluded that they should advise their client to enter a guilty plea and the District Court so found. They necessarily took into account the testimony placing him at the scene of the crime, and the proffered testimony of the co-defendant, Ramos. Moreover, they must have taken into account the fact that respondent's so-called "confession" contained facts substantially consistent with the theory of the defense and with respondent's actual testimony on the *voir dire*. At no time did respondent deny his presence at the scene of the crime, nor the fact that he was with the two men named as his co-defendants. What he disclaimed throughout was the fact that he had any knowledge of their intention to commit any crime.

These considerations make it clear that respondent, having proceeded to trial, is in no position to claim, with the benefit of hindsight, that his guilty plea was induced by the existence of the statement and of the pre-*Jackson* procedure.

CONCLUSION

For the foregoing reasons, the instant petition for a writ of certiorari should be granted.

Dated: New York, New York, April 1, 1970.

Respectfully submitted,

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Attorney General of the
State of New York
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APPENDIX "A".

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

68 Civil 1475

UNITED STATES OF AMERICA *ex rel.* FELIX CAMACHO,

Petitioner,

against

HAROLD W. FOLLETTE, Warden of Greenhaven Prison, Stormville, N. Y.,

Respondent.

PALMIERI, J.

Petitioner is a New York State prisoner presently serving a prison term of 30 years to life upon his plea of guilty to the crime of murder in the second degree. Petitioner was originally indicted with two others for the crime of murder in the first degree in connection with the stabbing of a man whom they were attempting to rob. They were also indicted for robbery in the first degree arising out of a separate incident. The two co-defendants pleaded guilty to murder in the second degree prior to the trial of the indictment. Petitioner pleaded guilty during the course of his trial.

Petitioner has presented many claims and they will be discussed seriatim. Firstly, he claims that as an indigent person he was not allowed to have the assignment of a particular attorney to try his case, although the attorney was willing to represent him for the satutory fee. This is

raised for the first time in this application and thus petitioner has not exhausted his state court remedies with respect to it and it is not properly before this Court. 28 U.S.C. § 2254. It is worthy of note in this regard, however, that the choice of court-appointed counsel is a matter within the discretion of the court. See, *March* v. *Reincke*, 325 F. 2d 310 (2d Cir. 1963), *cert. denied*, 377 U. S. 938 (1964); *United States* v. *Bentvena*, 319 F. 2d 916, 936 (2d Cir. 1963), *cert. denied*, 375 U. S. 940 (1963).

Petitioner alleges several defects in the proceedings prior to his plea of guilty. He claims he was held by the police 40 hours before arraignment, that his confession was the product of coercion, that he was not apprised of his constitutional rights upon his arrest, and that he was denied a fair trial because he is uneducated, Spanish-speaking and has a "mental record." It is well settled that a voluntary plea of guilty entered on the advice of counsel, with one exception not relevant to this case, see *United States ex rel. Rogers* v. *Warden of Attica State Prison*, 381 F. 2d 209 (2d Cir. 1967), constitutes a waiver of non-jurisdictional defects in the proceedings which preceded the plea, *United States ex rel. Glenn* v. *McMann*, 349 F. 2d 1018 (2d Cir. 1965), *cert. denied*, 383 U. S. 915 (1966). Thus, if petitioner's plea was voluntary the contentions he makes as to prior defects are not a basis for habeas corpus relief. *Id.* It may be noted that petitioner's claim under the doctrine of *Escobedo* v. *Illinois*, 378 U. S. 478 (1964) and *Miranda* v. *Arizona*, 384 U. S. 436 (1966) is without merit in view of the fact that his conviction preceded the ruling in those cases and they have been held not to be retroactive. *Johnson* v. *New Jersey*, 384 U. S. 719 (1966). Additionally, it appears that petitioner was provided an interpreter during the state proceedings against him.

Appendix A.

Petitioner claims that his plea of guilty was involuntary. He alleges that his counsel and the prosecutor coerced his plea, that his representation by counsel was inadequate and that counsel told him that the judge promised to sentence him to no more than a five-year prison term if he pleaded guilty. It appears that counsel strongly advised petitioner to plead guilty to the lesser crime of murder in the second degree to cover the indictment for murder in the first degree and the separate indictment for a different robbery. Petitioner has not shown that this advice was in any way improper, nor does it appear from the record that it was. The plea was entered after witnesses had testified that a man dressed as petitioner was at his arrest had fled from the scene of the crime. Police officers had testified that they had not beaten petitioner in order to obtain his confession. The prosecutor, in his opening remarks to the jury, had indicated that one of the co-defendants would testify in support of the state's case. In these circumstances counsel's advice may well have been in petitioner's best interest. In any event it cannot be said to have been improper. Such advice by counsel does not render a plea of guilty involuntary and his plea should not be set aside on that basis. See, *United States ex rel. McGrath* v. *LaVallee*, 348 F. 2d 373 (2d Cir. 1965); *Laboy* v. *State of New Jersey*, 266 F. Supp. 581, 584 (D.N.J. 1967). Nor does petitioner show that the representation by defense counsel was so defective as to shock the conscience of the Court. See, *United States ex rel. Boucher* v. *Reincke*, 341 F. 2d 977 (2d Cir. 1965) and cases cited therein. See *infra* at page 9. Petitioner's claim that the trial judge told defense counsel that if he pleaded guilty he would receive no more than a five year prison term must be dismissed as lacking any evidentiary support. *United States ex rel. Homchak* v. *New York*, 323 F. 2d 449 (2d Cir. 1963); *United States ex rel. Realmuto* v. *Wallack*, 254 F. Supp. 1006, 1009

(S.D.N.Y. 1966). Petitioner states that one of his attorneys is now dead. He was represented by two counsel, however. The record of the pleading which is presently before this Court shows that petitioner understood the nature of the proceedings and that his plea was voluntary. He was thoroughly questioned by the court. In view of this it is not necessary for this Court to hold a hearing with respect to this matter. See *United States ex rel. McGrath* v. *LaVallee*, 319 F. 2d 308, 312 (2d Cir. 1963); *Perna* v. *United States*, 68 Civ. 1203 (S.D.N.Y. May 21, 1968).

In addition to his claim that his plea was involuntary, petitioner asserts that it was subject to an improper condition and therefore invalid. The district attorney's recommendation to the court of acceptance of a plea to a lesser count was necessary in order for petitioner's plea to be accepted. See N. Y. Code Crim. Proc. § 342-a. The district attorney expressed his willingness to approve the plea and dismiss the other charge against petitioner 31 days after his sentencing on the condition that petitioner neither appeal his conviction or move to withdraw his plea within that 31 day period. (To appeal petitioner had to file a notice of appeal within 30 days. N. Y. Code Crim. Proc. § 521.) The same condition was attached to the pleas of the co-defendants in this case. One of them, Ramos, brought an application for a writ of habeas corpus on precisely the ground petitioner presents here. *United States ex rel. Ramos* v. *Fay*, 64 Civ. 3463. It was denied by this court (Tyler, J.) on February 15, 1965. An appeal from that decision was dismissed as frivolous by the Second Circuit on September 16, 1965. The district court held that

> "far from being the imposition of an improper condition, [it] actually amounted to a wise and precautionary advice to insure full and practical understanding of what was being done."

Appendix A.

The trial court in this case made it clear to petitioner that the only way his plea could effectively dispose of all the outstanding charges against him would be if he refrained from appealing his conviction or moving to withdraw the plea within 31 days. There was no constitutional infirmity in the proceedings. It is to be remembered that what is presented here is an accomodation of the interests of defendant in permitting him by the entry of one plea to dispose of all the outstanding charges against him, thus lessening the severity of the criminal sanctions confronting him. No consideration of due process would appear to justify any interference with this accommodation. "Many plea agreements are valid so long as the defendant is 'fully aware of the * * * actual value of any commitments made to him by the court, prosecutor; or his own counsel.' *Shelton* v. *United States*, 242 F. 2d 101, 115 (5th Cir. 1957) (dissent), rev'd enbanc, 246 F. 2d 571, rev'd on confession of other error, 356 U. S 26 (1958)." *United States ex rel. Thurmond* v. *Mancusi*, 275 F. Supp. 508, 518 (E.D.N.Y. 1967). It is worth stressing that the defendant's plea of guilty was made in the midst of trial and with the advice and assistance of two experienced attorneys, both former prosecutors and an interpreter. There can be no doubt that the plea was not only voluntary, but that it was understandingly and knowingly made. See *Smith* v. *O'Grady*, 312 U. S. 329, 334 (1941); *Munich* v. *United States*, 337 F. 2d 356, 359 (9th Cir. 1964). Moreover, petitioner initiated the accommodation for his own benefit. His offer to plead would have been illusory if after receiving approval of the arrangement and entering his plea he were free to embrangle the situation by asserting as he does here that the plea was improper. This Court is of course aware that a court cannot properly bargain with a defendant, *United States ex rel. Elksnis* v. *Gilligan*, 256 F. Supp. 244 (S.D.N.Y. 1966), nor can it put a price on an appeal. The right of appeal must, understandably, be free and unfet-

tered. *Worcester* v. *Commissioner of Internal Revenue*, 370 F. 2d 713 (1st Cir. 1966). But where a defendant makes his own terms and understands them and thereby brings an end to his trial and the separate outstanding indictment against him, he should not be permitted to later reevaluate his position, particularly where the *status quo ante* cannot be restored. Here the arrangement that the defendant made and initiated cannot now be rescinded as the separate indictment of petitioner for robbery has been dismissed. Petitioner has successfully wiped the slate clean. He should not now be permitted to attack his arrangement in collateral proceedings in this Court. In any event, whatever doubt there may conceivably be on this point appears to have been resolved against petitioner's position by the decisions in *United States ex rel. Ramos* v. *Fay, supra.*

Petitioner's contention that the court improperly refused to allow him to withdraw his guilty plea is without merit. The first request was equivocal and not adhered to by counsel. Petitioner, at the time set for sentencing, said:

> "I want to say to the Court, if I don't get a light sentence in this case that I would like to withdraw my plea and go on with the case."

After the court ascertained that petitioner did not want to say anything else, defense counsel said:

> "There is no legal cause why sentence should not be pronounced, if your Honor pleases."

In these circumstances it cannot be said that the court's refusal to allow the withdrawal of the plea was an abuse of the discretion the court had in this regard. See *United States ex rel. Best* v. *Fay*, 239 F. Supp. 632 (S.D.N.Y. 1965). Petitioner also attempted to withdraw his plea a

second time. He had been unable to file his notice of appeal within the prescribed time period because of certain prison practices and procedures. The court, in a *coram nobis* proceeding, ordered him resentenced so as to allow him to apepal his conviction. Upon his resentencing petitioner attempted to withdraw his plea. The denial of this request was within the court's discretion, particularly in view of the limited purpose of the resentencing procedure.

Petitioner also alleges that the testimony of a police officer at his aborted trial was perjured, that evidence was suppressed by the prosecutor and that his counsel was inadequate because of his failure to call certain witnesses. Petitioner claims that when he was presented to the victim at the hospital before his death, the victim said that petitioner was not one of the men who attacked him. The police officer who was present at the hospital when the alleged incident occurred testified that the victim was unconscious at the time and could make no response. Petitioner alleges that an unidentified doctor and a nurse were present and could corroborate this claim. In view of the fact that petitioner had personal knowledge of the event it cannot be said that the prosecution suppressed evidence of it. Nor does petitioner substantiate his allegation that perjured testimony was used with any evidentiary facts. *Cf., United States ex rel. Realmuto v. Wallack, supra.* Furthermore, it would seem that petitioner's contentions here relate to defects in the proceedings prior to his voluntary plea of guilty. As such the contentions have been waived. See discussion *supra* at page 2. Insofar as these contentions relate to petitioner's claim that his representation by counsel was inadequate it may be noted that he alleges that when he told counsel that the officer was lying counsel said that even if he called the doctor and nurse the officer's testimony would be accepted by the jury. It would appear, then, that his failure to call the two potential witnesses, assuming petitioner's

factual allegations are accurate, was a matter of trial strategy and not a proper basis for relief here. In any event, the allegations are unsupported and the representation of petitioner does not appear to have been of the kind to require the setting aside of his conviction. See *United States* v. *Garguilo*, 324 F. 2d 795 (2d Cir. 1963).

Petitioner's final contention is that his conviction should be set aside because the two co-defendants who had previously said that petitioner wielded the knife have now signed sworn statements exculpatory of petitioner in this respect. Although the original statements have not been presented to the Court, petitioner's claim will be considered. At the time of the pleas and sentencings each of the co-defendants tried to shift the blame for the actual stabbing to another. It never became clear who, in fact, did the stabbing and the trial court did not consider the question in sentencing the defendants. The court, at petitioner's sentencing, said:

> "I am not here as a police officer to solve which one [of the defendants] struck the mortal blow. They are all equally guilty, as you very able lawyers well know."

Petitioner did receive a longer sentence than the co-defendants. However, the basis for it was the fact that it appeared from the probation report that petitioner was the leader of the three men. As the court said, the matter of who actually stabbed the victim was not important as the victim was killed in the process of the commission of a felony and therefore all of the persons involved in committing the felony were equally chargeable under the law.

In view of what has been said the petition is denied. It is so ordered.

Dated: New York, N. Y., July 3, 1968.

EDMUND L. PALMIERI,
U. S. D. J.

APPENDIX "B".

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 384—September Term, 1969.
(Argued December 18, 1969 Decided February 2, 1970.)
Docket No. 33667

UNITED STATES OF AMERICA *ex rel.* FELIX COMACHO,
Petitioner-Appellant,

v.

HAROLD W. FOLLETTE, Warden, Green Haven State Prison, Stormville, New York,
Respondent-Appellee.

Before:

FRIENDLY, SMITH and ANDERSON,
Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Edmund L. Palmieri, *Judge*, denying appellant's petition for a writ of habeas corpus. Remanded for a hearing.

GRETCHEN WHITE OBERMAN, Esq., New York, N. Y. (Milton Adler, Esq., The Legal Aid Society, New York, N. Y., on the brief), *for Appellant.*

LILLIAN Z. COHEN, Assistant Attorney General, State of New York (Samuel A. Hirshowitz, First Assistant Attorney General and Louis J. Lefkowitz, Attorney General of the State of New York, on the brief), *for Appellee.*

Appendix B.

ANDERSON, *Circuit Judge:*

Felix Comacho was arrested on Friday, August 3, 1962, as one of three suspected participants in a pair of muggings, perpetrated that evening in the Bay Ridge section of Brooklyn. In the second of these assaults, the victim received fatal stab wounds.

Comacho was picked up sometime after 10:30 p.m. in the vicinity of the scene of the second assault. With the hope that an identification might be established, the arresting officer took him first to the hospital where the victim was being treated; and from there he was taken to a police station. On Saturday morning, after about 11 hours of questioning, Comacho gave an assistant district attorney a confession stating that he and two drinking companions, Villanueba and Ramos, had met and spoken about a plan to "do a job," after which the two assaults occurred. He alleged, however, that his two companions alone had assaulted and slain the deceased. Comacho stated in his confession that he himself had stood by watching, some 30 feet away, then became frightened, and fled, in the course of which he was apprehended.

The search for Ramos, the third of the alleged participants, continued on Saturday. After he was picked up, all three were arraigned together on Sunday, August 5th. Villanueba and Ramos both confessed, and they apparently implicated Comacho as the member of the group who actually committed the fatal stabbing. They subsequently entered pleas of guilty to charges of second degree murder, and their cases were severed.

Comacho's trial for first degree murder commenced April 29, 1963. The prosecutor stated in his opening remarks that Ramos would testify against the defendant and name him as the actual killer. The People first called a witness to the fatal attack who said that one of the three assailants

had worn a shirt like that in which Comacho was dressed at the time of his arrest. An off-duty police officer, who had joined in the case, and the arresting officer both testified that when the appellant was apprehended on a nearby street, he was sweating profusely and panting. The arresting officer stated that the victim failed to regain consciousness so that no identification was made at the hospital.

When Comacho's confession was offered in evidence at the trial, the judge ordered a voluntariness *voir dire* before the jury, in accordance with the New York practice before *Jackson* v. *Denno*, 378 U.S. 368 (1964). On the *voir dire*, Comacho testified through an interpreter that he was struck by the officers questioning him and given no food until Saturday night, that the police turned away his brother, who came to the precinct station to make inquiries, and that he told the court interpreter at arraignment that he had been injured. Various officers were present, and the appellant was asked to identify those who allegedly beat him. He identified three of the 16 called, and added that two others who struck him were not in the group. Several officers then denied his allegations.

The prosecutor next cross-examined Comacho concerning both of the assaults discussed in his confession, using the statements in it to impeach his credibility.

After a number of witnesses had testified on the *voir dire*, a brief adjournment was ordered. Comacho conferred with his appointed counse and then offered to withdraw his not guilty plea and plead guilty to second degree murder to cover both this indictment and another outstanding against him for robbery, grand larceny, and assault based on the earlier mugging on the same evening. As part of the judge's colloquy with him prior to acceptance of the guilty plea, Comacho stated that he had served as a lookout for his two friends; but had not himself stabbed the victim.

Appendix B.

At arraignment for sentencing, Comacho made a perfunctory request to withdraw his guilty plea "if I don't get a light sentence in this case." This equivocal request was not adhered to by his counsel, and he was sentenced to a term of 30 years to life imprisonment on October 14, 1963. The appellant now contends[1] that the guilty plea upon the basis of which this sentence was imposed was involuntary, since a substantial factor inducing it was his inability to have the voluntariness of his confession determined in a constitutionally proper manner. The district court found the plea voluntary on the basis of an examination of the colloquy, concluded that this fact worked a waiver of any

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[1] This question is the only one among the many raised by Comacho which is presently before us. In February of 1964, the appellant began *coram nobis* proceedings in a state court, alleging defects in his confession, in the representation provided by his two appointed attorneys, in his guilty plea, and in the fairness of his trial. The writ was denied without a hearing, and the Appellate Division affirmed. *People* v. *Comacho*, 22 A.D.2d 1017, 255 N.Y.S.2d 479 (2nd Dept. 1964). The New York Court of Appeals denied leave to appeal. Although Comacho did not file a timely notice of appeal from his conviction, this was found attributable to prison authorities' refusal to furnish a postage stamp; and his conviction was thereupon vacated as to his sentence. *People* v. *Comacho*, 46 Misc.2d 705, 260 N.Y.S.2d 723 (Sup. Ct. Kings Co. 1965). A sentence of from 30 years to life was again imposed; and Comacho's renewed attempt to withdraw his guilty plea was unsuccessful. The Appellate Division again affirmed, *People* v. *Comacho*, 27 A.D.2d 886, 281 N.Y.S.2d 990 (2nd Dept. 1967), and leave to appeal to the Court of Appeals was denied. The appellant once more began a *coram nobis* action, claiming that the victim had stated at the hospital, before he died, that Comacho was not one of his assailants; that an officer committed perjury in denying this at the trial; and that the prosecutor and trial judge had promised him a five-year sentence. The application was again denied, and an appeal is apparently still pending.

A variety of claims were raised in Comacho's habeas corpus application to the district court; but it is conceded that state remedies have not been exhausted in regard to some of them, and the court's rejection of others was not appealed.

prior procedural defects, and denied the petition without a hearing, upon the authority of *United States ex rel. Glenn* v. *McMann*, 349 F. 2d 1018 (2 Cir. 1965), *cert. denied*, 383 U.S. 915 (1966).

After the lower court had rendered its decision, this court clarified the meaning of *Glenn* in *United States ex rel. Ross* v. *McMann* and its companion case, *United States ex rel. Dash* v. *Follette*, 409 F. 2d 1016 (2 Cir.), *cert. granted*, 38 U.S.L.W. 3127 (No. 153) (Oct. 13, 1969), *dismissed as moot as to Ross*, 38 U.S.L.W. 3209 (Dec. 8, 1969). We explained that "[a]n alleged violation of constitutional rights is simply another factor to be taken into account in determining the voluntariness of the plea," 409 F. 2d at 1021, but that ". . . a mere conclusory allegation by a prisoner without more, that the existence of a coerced confession induced his guilty plea, in the absence of any particularized allegations as to how that confession rendered his plea involuntary, should not ordinarily be considered sufficient to predicate an order for a hearing." *Id.* at 1022. (Footnote and citations omitted.) With regard to the requisite allegations of a specific improper connection between a confession and a plea in each of those two cases in which defendants were unable to have the voluntariness issue determined by the court in the absence of a jury, this court held:

> "The petitioner cannot be deemed to have waived his coerced confession claim by deliberately by-passing state procedures when the state failed to afford a constitutionally acceptable means of presenting that claim, and he cannot be deemed to have entered a voluntary plea of guilty if the plea was substantially motivated by a coerced confession the validity of which he was unable, for all practical purposes, to contest." *Id.* at 1023.

Appendix B.

Comacho's petition alleges an almost identical causal connection between his claimed involuntary confession and subsequent involuntary guilty plea, and the particularized allegations concerning the confession and its relationship to the other evidence in the case have never been accorded a hearing by the state courts. Like the petitions of *Ross* and *Dash*, Comacho contends that the inadequacy of the pre-*Jackson* v. *Denno* voluntariness procedure, which offered no constitutional state method for challenging an allegedly coerced confession, had a critical effect upon his actions and substantially motivated the guilty plea. The only real difference in the fact patterns is that Comacho actually attempted to contest the voluntariness of his confession in the inadequate way provided him at the trial, before abruptly deciding to plead guilty to a lesser offense after segments of the confession and its references to another assault were revealed to the jury as part of the *voir dire*. Ross and Dash, on the other hand, abandoned the effort to suppress their confessions as futile at an earlier stage and did not even try to convince juries of the alleged improprieties.

In the present case, as in *Ross* and *Dash*, it cannot be ascertained from the record alone whether the ultimate decision to plead guilty was due to the weight of the evidence against the accused or was induced by fear of the prejudicial consequences of the jury's exposure to the evidence on the voluntary or involuntary nature of the confession. In *Johnson* v. *New Jersey*, 384 U.S. 719, 727-728 (1966), the Supreme Court stated that the unconstitutional procedure for the jury's determination of the voluntary nature of a confession in and prior to *Jackson* v. *Denno* adversely affected "the very integrity of the fact-finding process," and it gave *Jackson* v. *Denno* retroactive effect. Comacho is, therefore, entitled to a hearing upon his allegations that the guilty plea was involuntary.

Appendix B.

With regard to Comacho's additional claim that his plea was further rendered involuntary because of his fear that Ramos or Villanueba would give false testimony[2] by naming him as the actual wielder of the murder weapon, it need only be said that such an allegation about possible perjured testimony does not suggest actual prosecutorial suppression of evidence or any other causal connection, as required by *Ross* and *Dash*, between a violation of constitutional rights and a defendant's decision to enter a guilty plea.

Reversed and remanded.

FRIENDLY, *Circuit Judge:*

I concur on the authority of *United States ex rel. Ross* v. *McMann* and *United States ex rel. Dash* v. *Follette*, 409 F.2d 1016 (2 Cir. 1969), the latter of which is now pending before the Supreme Court.

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[2] Comacho called the district court's attention to what he claims are written statements given to him by his co-defendants shortly after all three of them arrived at prison. The statement attributed to Villanueba names Ramos rather than Comacho as the actual killer; but that allegedly given by Ramos, who was the co-defendant scheduled to testify against Comacho, seems merely to disavow the entire crime on behalf of both himself and the appellant. As the trial court observed, even testimony of Comacho's participation in the crime merely as the lookout would be sufficient to support a murder conviction upon the theory of felony-murder. In commenting upon this point, the district court noted that it, like this court, had not seen the co-defendants' original statements, and also added that "at the time of the pleas and sentencings each of the co-defendants tried to shift the blame for the actual stabbing to another. It never became clear who, in fact, did the stabbing and the trial court did not consider the question in sentencing the defendants." *United States ex rel. Comacho* v. *Follette*, 68 Civ. 1475 (S.D.N.Y. 1968).